Development & Commercial Bank Bhd v Land Administrator, Wilayah Persekutuan & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-70-89
MOHAMED AZMI, GUNN CHIT TUAN AND JEMURI SERJAN SCJJ
30 MARCH 1991

Land Law — Priorities — Priority of registered charge over subsequent registrar's caveat entered against land at request of Inland Revenue Department — Entry of caveat not communicated to chargor — Foreclosure proceedings taken by chargee against charged land — No likelihood of surplus after forced sale — Application for removal of registrar's caveat refused — Application for declaration defining substantive rights of parties for purpose of determining priority coupled with ancillary order to cancel the caveat — Specific Relief Act 1950, s 41 — Rules of the High Court 1980, O 15 r 16 — National Land Code 1965, ss 243, 256, 268, 320(1)(ba), 321(3) & 417

Civil Procedure — Declaration — No alternative remedy — Specific Relief Act 1950, s 41 — Rules of the High Court 1980, O 15 r 16

In this case the registered proprietor of a piece of land had executed a third party charge to secure the indebtedness of his company to the appellant bank. Subsequently, some four years after the charge was registered, the first respondent entered a registrar's caveat on the charged land at the request of the Inland Revenue Department. The first respondent notified the Inland Revenue Department and the registered proprietor but not the appellant chargee. The appellant subsequently initiated foreclosure proceedings against the charged land for the purpose of realizing the security towards the repayment of the debt due. The solicitors for the registered proprietor applied for the removal of the registrar's caveat but this was refused. The appellant applied for a declaration under s 41 of the Specific Relief Act 1950 and O 15 r 16 of the Rules of the High Court 1980 defining the nature of the respective substantive rights of the parties for the purpose of determining priority coupled with an ancillary order under s 417 of the National Land Code 1965 to give effect to the declaratory judgment. The application was refused in the High Court and the appellant appealed.

Held, allowing the appeal:

(1) Unless the registrar has acted without or in excess of jurisdiction, within the ultra vires doctrine, there is nothing unlawful in the entry of the registrar's caveat merely because there is an existing charge, just as it is perfectly legitimate for another charge or caveat to be entered on encumbered land. The remedy lies usually in the removal of the disputed caveat save where the decision on the entry is a nullity.

(2) Having regard to the scheme of the National Land Code 1965 and the fact that the Torrens system is to provide titles and interest by registration and not just a system of registration of titles and in particular to the provisions of ss 243, 268 and 340 of the National Land Code 1965 read with s 10(2) of the Government Proceedings Act 1956, the indefeasible interest of the appellant as chargee takes priority over the subsequent registrar's caveat in the same way as a registered charge takes priority over private caveats. The indefeasibility of interest of the prior registered charge under s 340 of the National Land Code 1965 must undoubtedly have priority over whatever interest whether in land or otherwise that may be created or intended to be created in favour of the Inland Revenue under s 320(1)(ba) of the National Land Code 1965.

(3) In this case the appellant chargee has no alternative remedy and is entitled to apply for a declaration and a consequential order to set aside the registrar's caveat under s 417 of the National Land Code 1965.

(4) Having regard to the circumstances of this appeal, this is a proper case where the learned trial judge ought to have exercised his discretion to grant a declaration as to the substantive right of the appellant chargee to priority over the Inland Revenue, particularly in the absence of any dispute that there would not eventually be any surplus of any proceed of sale of the land to be handed to the Inland Revenue after the chargee's priority to payment has been satisfied under s 268 of the National Land Code. The learned judge was in error when he assumed that it would be futile to grant the declaration sought.

(5) There is no express provision in s 321 of the National Land Code to enable a chargee on his own right to apply to the registrar or Land Administrator to cancel or remove the registrar's caveat, thereby making it quite impossible for the chargee to obtain a decision of the registrar for the purpose of an appeal under s 418. Moreover, under s 321(3), read with s 418, a chargee can only appeal against the registrar's decision to enter the caveat but not against a decision refusing to cancel the caveat. In the absence of the right to apply for cancellation and as well as the absence of express appeal provision by a chargee relating to refusal of the registrar to remove the caveat entered under s 320(1)(ba), a declaratory relief should be available to the appellant chargee. It is of course true that the power to grant declaratory judgment must be exercised with great care and jealousy, but at the same time its usefulness must not be underrated in appropriate cases.

(6) The appeal is allowed by granting the declaration sought and the first respondent is ordered under s 417 of the National Land Code to cancel the registrar's caveat within one week of the date of the judgment.

[Bahasa Malaysia summary

Di dalam kes ini tuanpunya didaftar harta berkenaan telah memberi gadaian pihak ketiga untuk menjamin hutang syarikatnya kepada bank perayu. Kemudiannya hampir empat tahun selepas gadaian itu didaftar responden pertama telah memasukkan kaveat pendaftar atas harta itu atas permintaan jabatan hasil dalam negeri. Responden pertama telah memberitahu perkara itu kepada jabatan hasil dalam negeri dan tuanpunya harta itu akan tetapi tidak kepada pemegang gadaian-perayu. Perayu telah mengambil tindakan halang tebus terhadap harta itu untuk mendapatkan penghasilan jaminan itu dan mendapat balik hutang yang belum dijelas. Peguamcara bagi pihak tuan punya harta itu telah memohon kaveat pendaftar itu disingkirkan akan tetapi permohonan itu telah ditolak. Perayu kemudian memohon perisytiharan di bawah s 41 Akta Relif Tertentu 1950 dan A 15 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk menentukan hak sebetulnya pihak-pihak yang berkenaan untuk memutuskan keutamaan mereka beserta dengan perintah sampingan di bawah s 417 Kanun Tanah Negara untuk memberi kesan kepada penghakiman perisytiharan itu. Permohonan itu telah ditolak di Mahkamah Tinggi dan perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Kecuali jika pendaftar telah bertindak tanpa atau melebihi bidangkuasa, mengikut doktrin utlra vires, tidak ada

apa-apa kesalahan mengenai catatan kaveat pendaftar hanya oleh kerana adanya gadaian yang telah wujud, seperti juga sahnya sesuatu gadaian atau kaveat dicatatkan sungguhpun tanah itu telah pun digadai lebih awal. Remedinya ialah supaya menyikirkan kaveat yang dipertikaikan itu kecuali jika keputusan membuat catatan itu sendirinya terbatal.

(2) Memandang kepada sistem peraturan Kanun Tanah Negara dan kenyataan bahawa Sistem Torrens ialah untuk memberi hak milik dan kepentingan dengan pendaftaran dan bukan hanya sistem pendaftaran hak milik dan khususnya kepada peruntukan ss 243, 268 dan 340 Kanun Tanah Negara dan s 10(2) Akta Perlindungan Pihak Berkuasa Awam 1956, kepentingan tak boleh sangkal perayu sebagai pemegang gadaian mendapat keutamaan keatas kaveat pendaftar yang terkemudian seperti juga gadaian yang didaftar mendapat keutamaan keatas kaveat persendirian. Kepentingan tak boleh sangkal pemegang gadaian yang terdahulu itu di bawah s 340 Kanun Tanah Negara hendaklah semestinya mendapat keutamaan keatas apa-apa jua kepentingan sama ada atas tanah atau selainnya yang telah diwujudkan atau dicadangkan diwujudkan bagi pihak Jabatan Hasil dalam negeri di bawah s 320(1)(ba) Kanun Tanah Negara.

(3) Di dalam kes ini perayu tidak mempunyai apa-apa remedi lain dan berhak memohon perisytiharan dan perintah berbangkit untuk mengenepikan kaveat pendaftar di bawah s 417 Kanun Tanah Negara.

(4) Memandang kepada keadaan rayuan ini, ini adalah kes yang wajar dimana yang arif hakim yang membicarakan kes itu hendaknya menggunakan budibicaranya untuk membuat perisytiharan mengenai hak sebetulnya perayu sebagai pemegang gadaian untuk mendapat keutamaan keatas Jabatan Hasil di dalam Negeri, lebih-lebih lagi oleh kerana tidak ada pertikaian bahawa tidak akan terdapat apa-apa kelebihan selepas penjualan tanah itu untuk diberi kepada Jabatan Hasil dalam Negeri selepas menyelesaikan hak keutamaan pemegang gadaian di bawah s 268 Kanun Tanah Negara. Hakim yang arif itu telah tersilap apabila beliau menganggapkan adalah sia-sia membuat perisytiharan yang dipohon itu.

(5) Tidak terdapat peruntukan ternyata di dalam s 321 Kanun Tanah Negara yang membolehkan seorang pemegang gadaian atas haknya sendiri memohon kepada pendaftar atau Pentadbir Tanah untuk membatal atau menghapuskan kaveat pendaftar itu dan oleh kerana itu adalah mustahil bagi pemegang gadaian mendapat keputusan pendaftar untuk membolehkannya merayu di bawah s 418. Juga di bawah s 321(3) dibaca bersama dengan s 418 seorang pemegang gadaian hanya boleh merayu dari keputusan pendaftar untuk memasukkan kaveat akan tetapi tidak boleh merayu terhadap keputusan pendaftar itu menolak permohonan membatalkan kaveat itu. Di dalam ketiadaan hak memohon pembatalan kaveat itu dan juga ketiadaan peruntukan yang jelas memberi hak rayuan kepada pemegang gadaian mengenai penolakan permohonan membatalkan kaveat itu oleh pendaftar, di bawah s 320(1)(ba), peluang mendapat pemulihan perisytiharan hendaklah diberi kepada perayu sebagai pemegang gadaian. Memang benar kuasa memberi penghakiman perisytiharan itu hendaklah digunakan dengan amat cermat dan waspada, akan tetapi faedahnya tidak harus dimemperkecilkan di dalam keskes yang layak.

(6) Rayuan hendaklah dibernarkan dengan memberi perisytiharan yang dimohon dan responden pertama adalah diperintahkan di bawah s 417 Kanun Tanah Negara membatalkan kaveat pendaftar itu dalam masa seminggu dari penghakiman ini.

Cases referred to

1 *Pendaftar Hakmilik Negeri Kedah* v *Oversea-Chinese Banking Corp Ltd* [1991] 2 MLJ 177 (refd)
2 *Development & Commercial Bank* v *Government of Malaysia & Ors* [1989] 3 MLJ 359; Supreme Court Civil Appeal No 01-30-1989 (distd)
3 *MBF Finance Bhd* v *Pendaftar Hakmilik Negeri Perak* [1990] 3 MLJ 437 (refd)
4 *Registrar of Titles, Johore* v *Temenggong Securities Ltd & Anor* [1976] 2 MLJ 44 (refd)
5 *Oversea-Chinese Banking Corp Ltd* v *Pendaftar Hakmilik, Negeri Kedah* [1990] 2 MLJ 478 (refd)
6 *Malayan United Finance Bhd* v *Tan Lay Soon* [1991] 1 MLJ 504 (folld)
7 *Public Bank Bhd* v *Pengarah Tanah dan Galian Johore Bahru & Anor* [1990] 3 MLJ 100 (distd)
8 *Esah bte Saad* v *Mariam bte Saad* [1975] 2 MLJ 97 (distd)
9 *Kulu Wan Teh* v *Government of Malaysia* [1938] MLJ 92 (distd)
10 *Metal Industry Employees Union* v *Registrar of Trade Unions* [1976] 1 MLJ 92 (distd)
11 *Manggai* v *Government of Sarawak* [1970] 2 MLJ 41 (distd)
12 *Land Executive Committee of FT* v *Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 (distd)
13 *Ikeneweka* v *Egbuna* [1964] 1 WLR 219 (folld)
14 *Datuk Syed Kechik* v *Government of Malaysia* [1979] 2 MLJ 101 (folld)

Legislation referred to

Government Proceedings Act 1956 s 10
National Land Code 1965 ss 243, 256, 268, 320(1)(ba), 321(3), 340(1)
Specific Relief Act 1950 s 41
Rules of the High Court 1980 O 15 r 16

Appeal from: Originating Summons No S 5-21-10-89 (High Court, Kuala Lumpur)

WSW Davidson (*Thomas Mariasoosay* and *Lucy NW Chang* with him) for the appellant.
Zaleha Zahari (Penguam Kanan Persekutuan) (*Mohd Bazain Idris* with her) for the respondents.
N Navaratnam for the intervener.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): This appeal poses a serious problem confronting the banking industry in this country, regarding the apparent difficulty in reconciling on the one hand, the indefeasibility of interest of registered charges under s 340 of the National Land Code 1965 ('NLC'), in particular their right to foreclose the charged land, with the right on the other hand, of freezing the land by the Inland Revenue by refusing to remove a registrar's caveat subsequently entered under s 320(1)(ba) thereby making it quite impossible for any dealing in the land to be affected even if an order of sale under s 256 could be successfully obtained. Further, no person in his right mind would agree to purchase any charged land which is also encumbered with a caveat, especially entered for the purpose of securing the availability of the land to satisfy the income tax liability of the proprietor. The fundamental issue for determination is not merely

whether the registrar's caveat under s 320(1)(ba) can be entered and maintained as of right over land already encumbered with a registered charge, but also more importantly on the issue whether the appellant chargee should have been granted under s 41 of the Specific Relief Act 1950 and O 15 r 16 RHC 1980 a declaration defining the nature of the respective substantive rights of the parties for the purpose of determining priority coupled with an ancillary order under s 417 of the NLC to give effect to the declaratory judgment.

We need to say at the outset, that for purpose of convenience, we heard this appeal jointly with another appeal between *Pendaftar Hakmilik Negeri Kedah* v *Oversea-Chinese Banking Corp Ltd.*[1] Due to some dissimilarity on the facts and different procedure adopted by the chargees, we have decided to deliver separate judgment for each appeal, although the principal issue of law in both appeals relates to s 320(1)(ba) of the NLC.

The facts of this particular case may be summarized as follows. On 8 March 1983, one Dr Mohd Rais (the taxpayer/chargor) executed a third party charge to secure the indebtedness of his company, AJK Holding Sdn Bhd, to the appellant bank, over a piece of land held under G No 35, Lot 9064, mukim of Ampang. The land is held under Land Office title and the land was then free of encumbrances or caveats. On 17 March 1987, ie some four years after the charge was registered, the Land Administrator (first respondent) who is the registrar's caveat on the charged land pursuant to s 320(1)(ba) of the NLC at the request of the Inland Revenue (second respondent). The Land Administrator notified the Inland Revenue and Dr Mohd Rais of the entry of the registrar's caveat but not the appellant chargee. The grounds for the caveat is to protect the interest of the Federation in that Dr Mohd Rais has not settled his income tax due to Inland Revenue. On 27 April 1987, ie shortly after the registrar's caveat was entered, but before the appellant chargee became aware of it, the appellant chargee having obtained judgment against the principal borrower AJK Holdings for $11.2m initiated foreclosure proceedings against the charged land for the purpose of realizing the security towards the repayment of the debt due. The forced value of the land was estimated by professional valuers at $1.8m.

There is no likelihood for a surplus assuming that the appellant chargee is entitled to have priority of payment. On 11 April 1988, before any order for sale was made, a foreign embassy in Kuala Lumpur showed an interest in purchasing the land by a private treaty at $1.8m. On 10 October 1988, solicitors for Dr Mohd Rais applied to the Inland Revenue for the removal of the registrar's caveat. The request was refused. Although the entry of the caveat was never communicated to the appellant, counsel for the appellant did attempt to introduce before us a definite date of knowledge by way of fresh evidence that the first time the appellant chargee came to know of the caveat was on 29 November 1988, when a copy of the Inland Revenue's letter of refusal to remove the caveat was forwarded to the appellant. The attempt fails as counsel for the respondents is quick to point out in the supplementary written submission that such fresh evidence is inadmissible. We are therefore left with a situation where on the evidence in the court below, there is no dispute that until today the decision to enter the March 1987 caveat was never communicated to the appellant by the Land Administrator.

As indicated earlier, the appeal by the appellant is against the refusal of the High Court judge to allow the declaration sought by the bank. Grounds 3 and 4 of the memorandum of appeal state:

> (3) The learned judge ought to have exercised his discretion to consider the substantive question of priorities as between the chargee and the Federation arising from the registered charge and the registrar's caveat respectively and to have made a declaration that the chargee had priority.
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> (4) Having made a declaration on the question of priorities, the learned judge ought then to have made an order under s 417 of the National Land Code to give positive effect to the said declaration and to enable the chargee to exercise its prior rights free from the registrar's caveat.

In the court below, counsel for the defendants (the present respondents) conceded that s 417 empowered the court to remove the caveat, but on the facts and the circumstances of this case, it was not available to the present chargee. It was also submitted that the court must decide on the validity of the caveat first before dealing with the question of priority (see p 18 of the appeal record). Be that as it may, the refusal of the trial judge to grant the declaration sought is not based on any impediment on either issue of validity of the caveat or right of the Inland Revenue to priority, nor on the alleged non-applicability of s 417. Although we do not have the benefit of a written judgment, the approach taken by the learned judge was not because the appellant was not entitled to a declaratory judgment, but purely on the pessimistic belief that to do so would be an exercise in futility. This can be garnered from his brief finding at p 23 of the appeal record:

> OS dismissed with costs.
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> It is quite plain to this court that the registrar's caveat can only be removed under s 321(3). And granting a declaration will not help to remove the caveat. Such a declaration would be ineffective. The declaration sought is refused.

From the above finding, it is apparent that the trial judge refused to consider the issue of priority and was of the opinion that the declaration on priority would be useless because chargees had been totally excluded from s 321(3) and therefore had no right to apply for the

cancellation of the registrar's caveat, notwithstanding the concession made by Encik Balia Yusof, counsel for the first and second defendants in the court below, to the effect that in appropriate cases, the court could order the removal of the caveat under s 417. If the declaration had been granted, there appeared to be no reason given why it could not be made effective by invoking that section, notwithstanding s 321(3).

As in the *OCBC* case[1] (the other related appeal), there is no suggestion here that the registrar had acted mala fide when entering the registrar's caveat under s 320(1)(ba) for the purpose of protecting the interest of the Federation in respect of the income tax due from Dr Mohd Rais. But unlike the other appeal, the stand taken by Mr Davidson, counsel for the appellant, is that there is nothing wrong in the registrar's entering the caveat in the first instance. He submits that the Land Administrator's action in this particular case is not ultra vires for acting in excess of jurisdiction merely because he knew or ought to know the existence of the prior charge in favour of the appellant at the relevant time. However, he proceeds to argue that notwithstanding the valid entry of the registrar's caveat, the trial judge ought to grant the appellant the declaration on the legal rights of the parties together with an ancillary order directing cancellation of the caveat under s 417.

On the issue of the proper procedure to be adopted by an aggrieved chargee under the NLC to remove a registrar's caveat, we have been told that there have been conflicting decisions in the High Court. One leading opinion is expressed by KC Vohrah J in *Development & Commercial Bank* v *Government of Malaysia & Ors*,[2] where the court held that the chargee cannot proceed under s 417 but must proceed by way of appeal under s 418. His Lordship states:

> With respect to learned counsel I do not agree with her view that her application could have proceeded under s 417. Section 321(3) prescribes specific instances under which the registrar's caveat may be cancelled and the plaintiff company had a remedy open to it as is prescribed by s 321(3)(c). Under para (a) of s 321(3) the registrar may cancel the caveat on his own motion. Under para (b) the registrar may cancel the caveat on an application by the proprietor of the land. If the registrar refuses to cancel the caveat on such an application by the proprietor of the land the proprietor may under para (c) of s 321(3) make an appeal under s 418 of the Code against the registrar's refusal to cancel the caveat.
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> If there is a person other than the proprietor who is aggrieved by the registrar's decision to enter the caveat, that person may, as is provided for under para (c) of s 321(3), appeal under s 418 of the Code.

On the particular procedure adopted in that case, we see nothing wrong in the judgment of KC Vohrah J. In fact, the decision has been upheld summarily by the Supreme Court vide Supreme Court Civil Appeal No 01-30-1989. But the nagging question here is whether a chargee who knows nothing about the entry of the caveat or who does not object to its entry in the first instance, has the right to apply subsequently under s 321(3) for the removal of the caveat? He can of course appeal within three months of being notified against the entry of the registrar's caveat, but if he has no right to apply for its removal, how can he ever appeal against the refusal of any application for its cancellation under s 418? In any event, KC Vohrah J was not dealing with an application for a declaratory judgment when he held that s 417 was inapplicable in the circumstances of that case.

The other leading opinion can be found in *MBF Finance Bhd* v *Pendaftar Hakmilik Negeri Perak*[3] where Peh Swee Chin J ordered the removal of the registrar's caveat on the chargee's application by originating motion which also contained a claim for a declaration of the chargee's right ranking in priority to that of the Inland Revenue. His Lordship was of the view that even if there was an existing charge, the registrar or Land Administrator was entitled to enter a caveat under s 320(1)(ba). At p 440, his Lordship states:

> Thus the new para (ba) undoubtedly creates an express statutory right for any government department such as the Inland Revenue Department, in respect of any debt due to it from a land owner to request a Registrar of Titles to enter a registrar's caveat, and the registrar, in exercising his quasi-judicial discretion described by Lord Diplock in *Temenggong*, can no longer in my view, rely on the decision of *Temenggong*, in refusing to enter a registrar's caveat on the ground that the debt would not come within the word 'interest' in s 320(1) of the Code. In view of the wording of the new para (ba), the registrar has no longer any discretion in refusing to enter such a caveat. it brings to mind some legislation in some sort of analogical mould, eg Essential (Protection of Depositions) Regulations 1986 which enable the Bank Negara or Central Bank to petition to court for the winding-up of a deposit-taking company though not being one of a recognized group of petitioners such as a contributory creditor etc. The Bank Negara, though qualified to petition for such winding-up obtains no interest of any kind for itself in the assets of the company.

Further down his Lordship continues:

> Applying the test laid down by the Privy Council in *Eng Mee Yong & Ors* v *V Letchumanan* [1979] 2 MLJ 212, the onus would be for the caveator, and in the instant case, the party in the shoes of a caveator, who had requested the registrar to enter a registrar's caveat for his benefit, ie the Director General to satisfy this court that on the evidence presented to it, it did raise a serious question to be tried as to his claim to an interest in land as recognized by the Code. Thus the first hurdle against the Director General desirous of having the caveat remaining on the register proved to be insurmountable for no interest of the kind has been created by the new para (ba).

Unless the registrar has acted without or in excess of jurisdiction, within the ultra vires doctrine, we agree with the judgment of Peh Swee Chin J that there is

nothing unlawful in the entry of the registrar's caveat merely because there is an existing charge, just as it is perfectly legitimate for another charge or caveat to be registered on encumbered land. The remedy lies usually in the removal of the disputed caveat save where the decision on the entry is a nullity.

On the issue of priority, the effectiveness of a charge under the Torrens System is provided by s 243 of the NLC:

> Every charge created under this Act shall take effect upon the registration so as to render the land for lease in question liable as security in accordance to the provisions thereof, expressed or implied.

On the indefeasibility of interest of the registered chargee, s 340(1) provides:

> The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

There is no dispute in this appeal that the interest of the appellant chargee does not come under any of the provisos of s 340 and as such, its interest is indefeasible under the NLC.

However, s 320(1)(ba) of the NLC which was introduced by amending Act No A444 with effect from 16 February 1979 to circumvent the decision of the Privy Council in *Registrar of Titles Johore* v *Temenggong Securities Ltd & Anor*[4] which limited the nature of interests of the government which the registrar was entitled to protect under s 320(1) to secured creditors, is now enlarged to include unsecured creditors.

The new paragraph (ba) reads:

> Subject to sub-section (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to be necessary or desirable —
>
> (ba) for securing that the land will be available to satisfy the whole or part of any debt due to the Federation or the State Authority, whether such debt is secured or unsecured and whether or not judgment thereon has been obtained.

Counsel for the appellant adopts the reasoning of Peh Swee Chin J in the *MBF Finance Bhd* case[3] that there is nothing in the NLC or elsewhere which creates a charge in favour of the Inland Revenue over the land or any rights giving priority over the chargee. He also submits that KC Vohrah J in *Oversea-Chinese Banking Corp Ltd* v *Pendaftar Hakmilik Negeri Kedah*[5] at p 481 (the other related appeal) is also correct in holding that the only form of priority given is the priority over other unsecured creditors conferred by s 10(1) of the Government Proceedings Act 1956. Further, he submits that s 10(2) is conclusive against the importation of any priority over secured creditors, when it says:

> Nothing herein contained shall affect any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge.

We agree with the submission of counsel for the appellant. In fact reading the supplementary written submission of counsel for the respondents, it is not seriously challenged that s 320(1)(ba) does not create any security similar to that created by a charge under s 243. In para 21, counsel even goes further by conceding that the government does not acquire any interest in the land at all. In our view, a close reading of para (ba) also does not suggest that Parliament intends that a chargee or the successful bidder at an auction sale is liable to contribute anything towards the tax liability of the land owner. Its only purpose is to prevent dealings in the land in appropriate cases for securing that the land will be available to satisfy the indebtedness of the proprietor to the government. The word 'securing' in para (ba) must simply mean 'ensuring'. In our view the interest created by para (ba) is the interest of securing or ensuring that the land will be available to satisfy any secured or unsecured debt of the proprietor to the government, and that is the interest now recognized by the NLC which can be registered as a caveat, but in the absence of express statutory provision, it enjoys no priority, and by virtue of s 10 of the Government Proceedings Act 1956, the caveat cannot affect any right vested in a registered chargee. Thus, the right of the registrar to maintain a caveat under para (ba) is subject to the indefeasible interest of the chargee. In the circumstances, we do not agree with the submission of counsel for the respondents that the purpose of the caveat is to enable the arrangement to be made for settlement of debt due to the government and that the caveat should remain indefinitely until a satisfactory arrangement can be made with the proprietor, the chargee or the purchaser. In our opinion, we cannot read into para (ba) that the registrar has unlimited power to suspend the vested right of the registered chargee in that fashion.

We are therefore of the opinion that having regard to the scheme of the NLC and the fact that the Torrens System is to provide titles and interests by registration and not just a system of registration of titles, and in particular to the provisions of ss 243, 268, and 340 read with s 10(2) of the Government Proceedings Act 1956, the indefeasible interest of the appellant chargee takes priority over the subsequent registrar's caveat, in the same way that this court has held in *Malayan United Finance Berhad* v *Tan Lay Soon*[6] that a registered charge takes priority over private caveats. The indefeasibility of interest of the prior registered chargee under s 340 must undoubtedly have priority over whatever interest whether in land or otherwise that may be created or intended to be created in favour of the Inland Revenue under s 320(1)(ba).

The only remaining point raised by the respondents against the granting of the declaration which merits our consideration is the submission that the appellant chargee ought to have appealed under s 418 against the decision of the Land Administrator either for entering the caveat, or for refusing to remove the caveat. To this argument counsel for the appellant points out that firstly the appellant chargee does not challenge the right of the Land Administrator to enter the caveat. As to the alternative suggestion that they should have applied for the removal of the caveat, counsel says that on the authority of the Supreme Court in *Public Bank Bhd* v *Pengarah Tanah dan Galian Johore Bahru & Anor*[7] only Dr Mohd Rais, the proprietor of the land and the caveator can do so, but the appellant chargee has been excluded from the provision of s 321(3). This subsection provides:

> A Registrar's caveat shall continue in force until it is cancelled by the Registrar —
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> (a) of his own motion; or
> (b) on an application in that behalf by the proprietor of the land affected; or
> (c) pursuant to any order of the Court made on an appeal under section 418 against his decision to enter the caveat, or his refusal of any application for its cancellation under paragraph (b).

Although the *Public Bank* case[7] did not specifically deal with a declaratory relief, reading the judgment of the court at p 349, there is some indication that chargees are completely excluded from making an application to cancel the caveat under s 321(3). This is in fact the opinion of the trial judge in this case and we agree with the learned judge as far as the exclusion is concerned. As alluded to earlier, if the chargee has no right to apply for the cancellation of the caveat, how could it ever appeal under s 418? Since the chargee cannot even apply, there cannot be any decision against which it can possibly appeal. Consequently the appellant chargee has no alternative remedy and is entitled to apply for a declaration and a consequential order to set aside the caveat under s 417 which is exactly what the appellant is doing instantly.

Learned counsel for the respondent has referred us to a number of authorities where the courts in this country have consistently refused to order a declaratory order where the aggrieved party has elected not to appeal although the remedy of appeal is available. (See *Esah bte Saad* v *Mariam bte Saad*[8] and *Kulu Wan Teh* v *Government of Malaysia.*[9]) In *Metal Industry Employees Union* v *Registrar of Trade Unions*[10] the Federal Court upheld the decision of Wan Suleiman FJ in declining the declaratory order since an alternative remedy existed by way of appeal under the Trade Unions Ordinance 1959. In addition, we also wish to refer to a similar decision of the Federal Court in *Manggai* v *Government of Sarawak*[11] and *Land Executive Committee of FT* v *Syarikat Harper Gilfillan Bhd.*[12] But for reasons already discussed, we are satisfied that the appellant does not have an alternative remedy in this case.

Having regard to the circumstances of this appeal, we are of the view that this is a proper case where the learned trial judge ought to have exercised his discretion to grant a declaration as to the substantive right of the appellant chargee to priority over the Inland Revenue, particularly in the absence of any dispute that there would not eventually be any surplus of any proceeds of sale of the land to be handed over to the Inland Revenue after the chargee's priority to payment has been satisfied under s 268 of the Code. In our view, the learned judge was in error when he assumed that it would be futile to grant the declaration sought.

The judgment of this court in *Development & Commercial Bank Bhd* v *Government of Malaysia*[2] and *Public Bank Bhd* v *Pengarah Tanah dan Galian Johore Bahru & Anor*[7] are not applicable in the instant appeal, because there, the registrar had communicated to the chargees his decision to enter the caveat. The remedy of appeal was undoubtedly available to them, and there was no difficulty in determining whether the appeal by the chargees was lodged within or without the statutory period under s 418.

For the above reasons, we are of the opinion firstly that there is no express provision in s 321 of the National Land Code 1965 to enable a chargee on its own right to apply to the registrar or Land Administrator to cancel or remove the registrar's caveat, thereby making it quite impossible for the chargee to obtain a decision of the registrar for the purpose of an appeal under s 418. Secondly, under s 321(3), read with s 418, a chargee can only appeal against the registrar's decision to enter the caveat but not against a decision refusing to cancel the caveat. In the absence of the right to apply for cancellation and as well as the absence of express appeal provision by a chargee relating to refusal of the registrar to remove the caveat entered under s 320(1)(ba), a declaratory relief should be available to the appellant chargee. It is of course true that the power to grant a declaratory judgment must be exercised with great care and jealousy, but at the same time its usefulness must not be underrated in appropriate cases. Thus in *Ibeneweka* v *Egbuna*[13] at p 224, Lord Radcliffe in giving the decision of the Privy Council said:

> Under O 25 r 5, the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide.

This passage was quoted with approval by Lee Hun Hoe CJ in the Federal Court in *Datuk Syed Kechik* v *Government of Malaysia*[14] at p 107, and in the same case the learned Chief Justice also said at p 107:

The basis of the jurisdiction is O 25 r 5 of the Rules of the Supreme Court. The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

and

A declaratory order will eliminate anxiety of having to live under a cloud of fear. In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy...

In the same case, the learned Chief Justice also said at p 108:

In *Ruislip-Northwood UDC* v *Lee* plaintiff sought the ruling of the court on a definite, concrete and existing dispute. The fact that the declaration was sought before the statutory powers were exercised was not a consideration weighing against the grant of that declaration. Nowadays, the courts seldom refuse to make orders on grounds that it is premature to consider the question. As Greer LJ pointed out that it had been for years the practice to know and determine claims for declaration of rights where there was a real and not a fictitious or academic question involved in order that the parties might know what course to take without running the risk of finding themselves liable to damages. Indeed, we consider that a court should make it possible to settle real disputes immediately they arise, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future.

Applying the above principles, we would allow this appeal with costs by granting the declaration sought, and under s 417 we order the Land Administrator (the first respondent) to cancel the caveat within one week from today. We also order that the deposit be refunded to the appellant.

Appeal allowed.

Solicitors: *Azman Davidson & Co; Shean Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Dato' Mat

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-134-90
ABDUL HAMID LP, AJAIB SINGH SCJ AND WAN YAHYA J
18 MARCH 1991

Criminal Procedure — Bail — Bail offered on condition of surrender of passport — Application to High Court to vary condition — Power of High Court to vary condition — Criminal Procedure Code (FMS Cap 6), ss 388, 389, 394 & 418A

The respondent had been charged for criminal breach of trust and had been offered bail in the sum of $400,000 in two sureties and on condition he surrenders his international passport to the court. The case was transferred to the High Court. The respondent applied for an order for the release of his international passport to enable him to make a business trip to Indonesia. The learned judge of the High Court varied the condition imposed and ordered the international passport to be returned to the respondent for a specific period. See [1991] 2 MLJ 125. The public prosecutor appealed against the order.

Held, dismissing the appeal:

(1) It is not illegal to impose fair and reasonable conditions and in particular the condition requiring the accused to surrender his passport, apropos to the securing of the accused's subsequent attendance in court.

(2) In the present case in view of the order made for the transfer of the case from the sessions courts to the High Court, the learned judge of the High Court was acting well within his jurisdiction to review the condition of bail as if the same was made by him.

(3) In any event, in the absence of any express provision in the Criminal Procedure Code to the contrary, a judge of the High Court may by virtue of s 4 of the Code exercise his revisionary powers under the Courts of Judicature Act 1964.

[Bahasa Malaysia summary

Di dalam kes ini responden yang telah dituduh dengan kesalahan pecah amanah jenayah telah diberi jaminan $400,000 dengan dua penjamin dan dengan syarat ia menyerahkan paspot antarabangsanya kepada mahkamah. Kes itu telah diperintahkan dipindakan kepada Mahkamah Tinggi. Responden telah memohon pasport antarabangsanya diberi balik kepadanya untuk membolehkannya membuat lawatan perniagaan ke Indonesia. Yang arif hakim Mahkamah Tinggi telah mengubah syarat yang dikenakan itu dan memerintahkan passport antarabangsa itu dikembalikan kepada responden untuk masa yang tertentu. Pendakwa raya telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Tidaklah menyalahi undang-undang mengenakan syarat yang berpatutan dan munasabah dan khasnya syarat meminta orang yang dituduh menyerah passportnya, supaya memastikan kehadiran kemudiannya di mahkamah.

(2) Di dalam kes ini memandang kepada perintah memindahkan kes itu dari mahkamah sesyen ke Mahkamah Tinggi, yang arif hakim Mahkamah Tinggi telah bertindak di dalam bidangkuasanya menyemak syarat jaminan itu seolah-olah ia dibuat oleh beliau sendiri.

(3) Walaubagaimanapun, oleh kerana tidak ada peruntukan jelas sebaliknya di Kanun Acara Jenayah, hakim Mahkamah Tinggi boleh di bawah s 4 Kanun itu, menjalankan kuasa penyemakannya di bawah Akta Mahkamah Kehakiman 1964.]